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15 UNITED STATES DISTRICT COURT  
16 NORTHERN DISTRICT OF CALIFORNIA

17 COYNES L. ENNIX JR., M.D

18 Plaintiff,

19 vs.

20 ALTA BATES SUMMIT MEDICAL  
21 CENTER

22 Defendant.

23 Case No.: C 07-2486 WHA

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25  
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27  
28 **DECLARATION OF ANDREW E.  
SWEET IN OPPOSITION TO  
DEFENDANT'S MOTION FOR  
SUMMARY JUDGMENT**

**Date: April 24, 2008**

**Time: 8:00 a.m.**

**Dept.: Ctrm. 9, 19<sup>th</sup> Floor**

**Judge: Hon. William H. Alsup**

**Complaint Filed: May 9, 2007**

**Trial Date: June 2, 2008**

22 I, Andrew E. Sweet declare:

23 1. I am an attorney licensed to practice in California, admitted to this Court,  
24 and an attorney at Moscone, Emblidge & Quadra LLP, attorneys of record for Plaintiff  
25 Coyness L. Ennix, Jr. M.D. I have personal knowledge of the facts stated in this  
declaration.

1       2. Attached hereto as Exhibit A is a true and accurate copy of ABSMC's  
2 Racial Composition Data concerning the Summit Medical Staff membership for 2004  
3 through 2006. ABSMC provided this document to plaintiff to represent its claim as to the  
4 racial makeup of the Summit Medical Staff. The exhibit lists 991 physicians, of which  
5 ABSMC identified the race of 547 physicians. Plaintiff believes that ABSMC's data  
6 underestimates the number of Caucasian physicians on the Summit Medical Staff.  
7 However, without conceding its accuracy and for purposes of this Opposition, Plaintiff  
8 accepts ABSMC's data regarding the racial make up of the Summit Medical Staff from  
9 2004 through 2006. Further, for purposes of analyzing this data for evidence of disparate  
10 treatment based on race, Plaintiff has eliminated from consideration all but the 547  
11 doctors for which ABSMC attributed a race, treating that set of 547 as if they represented  
12 the entire Medical Staff. Plaintiff believes that this approach underestimates Caucasian  
13 physicians, giving the impression that Caucasian physicians make up a smaller  
14 percentage of the Medical Staff than they actually do.

15       3. A true and accurate accounting of ABSMC's representations in Exhibit A  
16 are as follows: of the 547 physicians identified by race, ABSMC identified 379 as  
17 Caucasian, 65 as African American, and 96 as Asian.

18       4. Exhibit F to the Hernaez declaration in support of Defendant's Motion for  
19 Summary Judgment is a table ("ABSMC's Table"), produced in response to Plaintiff's  
20 discovery requests, listing each physician investigated by the Summit MEC since 19992,  
21 and providing some details about each investigation, including the race of the subject  
22 physicians. ABSMC's Table incorrectly identifies the race of the doctor identified as  
23 "Physician H" as "non African-American." As explained in the declaration of Physician  
24 H, filed herewith under seal, the race of Physician H is a mix of predominantly Indian,  
25 African American and Native American, with some English and Irish. For that reason,  
26 for purposes of analyzing patterns of disparate treatment in ABSMC's Table, Plaintiff  
27 treats Physician H as African American.

1       5. Attached hereto as Exhibit B– F are true and accurate visual representations  
2 that compare the racial composition of physicians reviewed at the MEC level as shown  
3 on ABSMC’s Table to the racial makeup of the Medical Staff, as shown on Exhibit A  
4 hereto. Exhibit B illustrates that while almost 70% of the Medical Staff is Caucasian,  
5 only about 55% of physicians reviewed by the MEC are Caucasian. In contrast, about  
6 12% of the Medical Staff is African American, but almost 28% of physicians reviewed  
7 by the MEC are African American.

8       6. Exhibit C illustrates that African American physicians on the Medical Staff  
9 face almost three times the risk of MEC review than their Caucasian colleagues.  
10 Specifically, 7.69% of the African American physicians on the Medical Staff are  
11 investigated by the MEC while only 2.64% of Caucasian physicians face the same fate.

12       7. Exhibit D illustrates that physicians of color, and African Americans in  
13 particular, are investigate by the MEC almost exclusively for patient care concerns, while  
14 Caucasian physicians are much more likely to be investigated for “behavioral issues” or  
15 violations of the bylaws. Specifically, of the physicians disciplined by the MEC, 30% of  
16 Caucasian physicians were disciplined for standard of care issues while 100% of African  
17 American physicians were disciplined for those reasons. The remaining 70% of  
18 Caucasian physicians were disciplined for behavioral issues or violations of the bylaws.

19       8. Exhibit E illustrates that Caucasian physicians at Summit have less than a  
20 1% chance of having their skill as a physician questioned by the MEC, but well over 7%  
21 of African American physicians at Summit have their skill questioned.

22       9. Exhibit F illustrates that physicians of color, and African Americans in  
23 particular, disproportionately face summary suspension by the MEC. Specifically 80% of  
24 African American physicians who reach the MEC level are summarily suspended while  
25 only 40% of Caucasian physicians are summarily suspended.

1       10. Attached hereto as Exhibit G is a true and accurate copy of a document  
2 produced in discovery by ABSMC. The document is a February 13, 2005, letter  
3 regarding Dr. Ennix from cardiothoracic surgeon Junaid Kahn to Dr. Isenberg.

4       11. Attached hereto as Exhibit H is a true and accurate copy of a document  
5 produced in discovery by ABSMC. The document is the Summit Medical Center  
6 Department of Surgery Peer Review Quality Indicators.

7       12. Attached hereto as Exhibit I are true and accurate copies of excerpts from  
8 the deposition transcript (including relevant exhibits) of Marilyn Barkin, R.N., who gave  
9 testimony pursuant to Federal Rule of Civil Procedure section 30(b)(6).

10       13. Attached hereto Exhibit J are true and accurate copies of excerpts from the  
11 deposition transcript (including relevant exhibits) of Joanne Jellin, PsyD., who gave  
12 testimony pursuant to Federal Rule of Civil Procedure section 30(b)(6).

13       14. Attached hereto as Exhibit K are true and accurate copies of excerpts from the  
14 deposition transcript (including relevant exhibits) of Leigh I. G. Iverson, M.D.

15       15. Attached hereto Exhibit L are true and accurate copies of excerpts from the  
16 deposition transcript (including relevant exhibits) of Debbie Mogg, who gave testimony  
17 pursuant to Federal Rule of Civil Procedure section 30(b)(6).

18       16. Attached hereto as Exhibit M are true and accurate copies of excerpts from  
19 the deposition transcript (including relevant exhibits) of William M. Isenberg, M.D.

20       17. Attached hereto as Exhibit N are true and accurate copies of excerpts from  
21 the deposition transcript (including relevant exhibits) of Russell D. Stanten, M.D.

22       18. Attached hereto as Exhibit O are true and accurate copies of excerpts from  
23 the deposition transcript (including relevant exhibits) of Hon S. Lee, M.D.

24       19. Attached hereto as Exhibit P are true and accurate copies of excerpts from  
25 the deposition transcript (including relevant exhibits) of Steven A. Stanten, M.D.

26       20. Attached hereto as Exhibit Q are true and accurate copies of excerpts from  
27 the deposition transcript (including relevant exhibits) of Lamont Paxton, M.D.

1       21. Attached hereto as Exhibit R is a true and accurate copy of a document  
2 produced in discovery by ABSMC. The document is the meeting minutes from the April  
3 12, 2004, SPRC meeting.

4       22. Attached hereto as Exhibit S is a true and accurate copy of a document  
5 produced in discovery by ABSMC. The document is the Summit Center Medical Staff  
6 Rules and Regulations (Revised 2/04) cover page and table of contents, and Chapter 24  
7 (“Peer Review Process”). The Summit Center Medical Staff Rules and Regulations are  
8 amended periodically; however, Plaintiff knows of no amendments in the Chapter  
9 regarding the Peer Review Process until after the peer review of Dr. Ennix.

10      23. Attached hereto as Exhibit T are true and accurate copies of excerpts from  
11 the deposition transcript (including relevant exhibits) of Dat Ly, M.D.

12      24. Attached hereto as Exhibit U is a true and accurate copy of the report  
13 written by Don Hill, M.D. regarding the same ten cases reviewed by the outside reviewer.

14      25. Attached hereto as Exhibit V are true and accurate copies of excerpts from  
15 the deposition transcript (including relevant exhibits) of Barry Horn, M.D.

16      26. Attached hereto as Exhibit W is a true and accurate copy of a document  
17 produced in discovery by ABSMC. The document is the meeting minutes from the  
18 second AHC meeting, which was on August 30, 2004.

19      27. Attached hereto as Exhibit X are true and accurate copies of documents  
20 produced in discovery by ABSMC. These documents are letters written by three Summit  
21 Registered Nurses to Drs. Isenberg, Herskowitz and S. Stanten that verify that Dr. Ennix  
22 visited the patient at issue.

23      28. Attached hereto as Exhibit Y is a true and accurate copy of a document  
24 produced in discovery by ABSMC. The document is an April 19, 2006, letter from all of  
25 the proctors to Dr. Paxton.

26      29. Attached hereto as Exhibit Z are true and accurate excerpts of the 2003-  
27 2004 California CABG Outcomes Reporting Program Report (“CCORP”) that show that

1 Dr. Ennix's mortality rate during the relevant time period was within the acceptable  
2 range. The Exhibit also shows that Dr. Iverson's mortality rate for 2003-2004 was higher  
3 than that of Dr. Ennix. The Exhibit further shows that Dr. Housman, one of the NMA  
4 peer reviewers, had a mortality rate below the acceptable range (identified as "worse").  
5 The following pages from the CCORP Report comprise Exhibit Z: The Executive  
6 Summary, "Table 5: Surgeon Risk-Adjusted Operative Mortality Results, 2003-2004" for  
7 Dr. Ennix, Dr. Housman and Dr. Iverson, and Figure 2: Surgeon Risk-Adjusted Operative  
8 Mortality Results for Dr. Ennix, Dr. Housman and Dr. Iverson. (The full report can be  
9 obtained from the State's website at

10 <http://www.oshpd.ca.gov/HQAD/Outcomes?Studies/cabg/200304HospSurgReport/fullreport.pdf>.)

12 30. Attached hereto as Exhibit AA are true and accurate copies of excerpts  
13 from the deposition transcript (including relevant exhibits) of Neil Smithline, M.D.

14 31. Attached hereto as Exhibit BB is a true and accurate copy of a document  
15 produced in discovery by ABSMC. The document is a January 4, 2005, letter from Drs.  
16 Paxton and Isenberg to the outside reviewer.

17 32. Attached hereto as Exhibit CC is a true and accurate copy of a document  
18 produced in discovery by ABSMC. The document is a memorandum written by Dr.  
19 Isenberg regarding his February 24, 2004, telephone conversation with Dr. Moorstein.

20 33. Attached hereto as Exhibit DD are true and accurate copies of excerpts  
21 from the deposition transcript (including relevant exhibits) of Leland Housman, M.D.

22 34. Attached hereto as Exhibit EE are true and accurate copies of ABSMC  
23 Objections and Responses to Plaintiff's Special Interrogatories, Set One.

24 35. Attached hereto as Exhibit FF are true and accurate copies of ABSMC  
25 Objections and Responses to Plaintiff's Request for Production of Documents, Set Two.

1       36. Attached hereto as Exhibit GG is the declaration and expert report of  
2 Howard Barkan, DrPH, originally submitted in opposition to Defendants' Special Motion  
3 to Strike.

4       37. Attached hereto as Exhibit HH is the declaration and expert report of  
5 Richard E. Shaw, M.A., Ph.D., F.A.C.C., F.A.C.A, originally submitted in opposition to  
6 Defendants' Special Motion to Strike.

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8       I declare under penalty of perjury under the laws of the United States of America  
9 that the foregoing is true and correct and that this declaration was signed in San  
10 Francisco, California.

11  
12 Dated: March 27, 2008

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/s/  
Andrew E. Sweet